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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

MUSCLEPHARM CORPORATION,

Debtor.

Case No.: 22-14422-NMC

Chapter 11

**SUPPLEMENTAL DISCOVERY POSITION STATEMENT OF EMPERY
TAX EFFICIENT, LP**

Empery Tax Efficient, LP ("Empery"), by its counsel of record, Garman Turner Gordon LLP, respectfully submits its Supplemental Discovery Position Statement as requested by the Court at the June 23, 2023 hearing, and respectfully submits the following:

On the Petition Date, the Debtor was a non-operational public company whose CEO Ryan Drexler ("Drexler") and his hand-chosen officers and employees were under investigation by the SEC for securities fraud and improper revenue recognition, among other crimes. With Drexler as CEO, the Debtor had ceased operations for months and had for years been systematically manipulating sales to artificially boost revenue for the purpose of defrauding investors and lenders. Over the past week, through Consent Judgments, Drexler's hand-chosen team, including his former

1 CFO, “does not deny” they engaged in securities fraud and other misconduct. On Tuesday, the
2 SEC commenced an action against Drexler alleging that he, inter alia, “Aided and Abetted
3 MusclePharm’s Fraud” (Drexler Complaint, p. 17:17) and that he did so for his personal gain.

4 Notwithstanding the now proven and long since suspected fraud of Debtor under Drexler’s
5 control, it took a monumental effort by the Debtor, its new officers and directors, and its
6 professionals to overcome the operational and financial “catastrophe” created by Drexler. This
7 effort required a new CEO, a new board, and additional capital in the form of DIP financing from
8 Empery. But equally important was regaining the trust of Debtor’s vendors and manufacturing
9 partners, who endured years of lies and contract breaches under the leadership of Drexler. Re-
10 establishing the goodwill required for manufacturers to allocate capacity to the Debtor cannot be
11 understated. The success of these stabilization efforts resulted in the profitable restart of the
12 business and a Plan Support Agreement (including a sale process) supported by all constituents
13 except Drexler—who has a vested interest in creating chaos and extorting settlements.

14 Drexler’s *Motion for the Appointment of a Chapter 11 Trustee* (the “Trustee Motion”),
15 which is supported by nothing more than Drexler’s declaration, seeks to derail the progress made
16 by Debtor. The thrust of the Trustee Motion is the claim that Debtor is suppressing revenue. As
17 a practical matter, the Trustee Motion contains no competent evidence, only the declaration of
18 Drexler, who claims that he knows and understands Debtor’s business and believes upon
19 information and belief that revenue is being manipulated. While the Trustee Motion is quick to
20 criticize Empery and claim it is in cahoots with Debtor, it provides no evidence whatsoever to
21 support the assertions. More importantly, despite the fact that Drexler had been manipulating
22 Debtor’s financials pre-petition, Drexler now asks the Court to rely on his judgment, ignoring the
23 now established fact that Debtor was wrought with fraud, financial manipulation and other bad
24 acts under his control.

25 Drexler seeks months of discovery on his Trustee Motion—in a bald attempt to uncover
26 some non-existent wrongdoing that he claims he has evidence of. Drexler further advocates that
27 the entire case must practically be stayed pending the resolution of the Trustee Motion. No one,
28 including Drexler, contends that the estate can withstand months of administrative costs. In fact,

1 that is one of the bases of his Trustee Motion—mounting administrative expenses. In light of that
2 fact, the Court should balance the need for discovery with the cost and delay caused by the
3 proceedings.

4 To this end, Debtor, the Committee, and Empery's proposed discovery plan seeks to both
5 accommodate reasonable discovery into the Trustee Motion while also ensuring that Debtor has a
6 business to reorganize when the Court ultimately denies the Trustee Motion. Empery does not
7 believe that it is necessary to wait until September 2023 to schedule an evidentiary hearing when
8 an evidentiary hearing can occur during the first two weeks of August. The administrative burden
9 of the Trustee Motion creates too much uncertainty to unnecessarily delay the progress being made
10 in this case.

11 To that end, it was proposed that the parties respond to written discovery within 9 days,
12 with depositions to occur shortly thereafter. In view of what is alleged in the Trustee Motion,
13 Drexler's weak declaration, the only evidence supporting the Trustee Motion, and the limited
14 budget in this case, there is simply no reason to wait until the first two weeks of August to begin
15 depositions. The DIP budget in this case cannot support months of fishing by Drexler while he
16 seeks to piece together evidence that does not exist.

17 Drexler sought two depositions of Empery, Mr. Lane and Mr. Silver. With no actual
18 evidence or concrete allegations against Empery, the depositions are a blind fishing expedition.
19 Empery proposed that it provide a single deposition to Mr. Drexler, which could be a FRCP
20 30(b)(6) deposition to capture Empery's knowledge. Drexler incorrectly states that Empery agreed
21 to depositions of both Mr. Lane and Mr. Silver but at no time did Empery agree to produce both
22 Mr. Lane and Mr. Silver for deposition. Empery had noted that if the parties could agree to the
23 remainder of the schedule and a limitation on the depositions, Empery may be prepared to produce
24 multiple witnesses. At this point, there has been no agreement on the remainder of the schedule.

25 Drexler further requests that the parties log all documents that are withheld from production
26 on any basis, no matter the objection. Empery believes this is overly burdensome, when coupled
27 with the overly board nature of Drexler's discovery requests. For instance, if a party requests all
28 communications between two individuals, without limitation as to time or substance, the counter

1 party would have to log each and every communication, potentially date back years. As an
2 example, *Debtor's counsel*, who proposed Mr. Rubin as the Independent Director in this case, has
3 worked with Mr. Rubin on other cases. Logging each and every communication would be overly
4 burdensome, and those communications would undoubtedly not be relevant in the least.

5 Similarly, Empery opposed Drexler's request that he have the opportunity to rebrief the
6 issues in the Trustee Motion before any scheduled evidentiary hearing. Drexler has already filed
7 the Trustee Motion and the basis for any trustee appointment must be succinctly contained therein.
8 It would be patently unfair for Drexler to change his theory of the case when the purported grounds
9 for a trustee cannot be supported by any evidence.

10 Drexler contends there is no "evidence of any of any business or other legitimate reason
11 for the accelerated and compressed schedule. . . ." Drexler Position Statement [ECF No. 639] 7:12-
12 15. First, Debtor was not operating when the case was filed. This Court approved a limited amount
13 of financing for Debtor through the Court approved DIP Financing. The budget for the financing
14 was increased multiple times prior to approval to provide sufficient funding to get the Debtor back
15 in business. The Debtor's cash generating operations have been re-commenced and the Debtor is
16 cash-flow positive on a post-petition basis (to date), but Debtor is operating significantly in the red
17 (negative) when reorganization fees, costs and expenses are taken into account. Second, this Court
18 ordered that the hearing on the Trustee Motion would be expedited, not drawn out. Drexler has
19 set forth his case. Re-review of the Trustee Motion shows it is not worthy of eight (8) depositions.
20 Foremost, there is simply no funding for a long fishing expedition by Drexler followed by a long
21 evidentiary hearing. This Court is faced with what is at best a threadbare motion to appoint a
22 trustee supported only by a deficient declaration submitted by Drexler based upon his "expertise,"
23 hearsay and double hearsay from unnamed sources and information and belief. Accordingly, the
24 declaration does not meet the standards for LR 9014(c). The credibility of Drexler is seriously
25 undermined on many fronts by SEC-related filings (in particular the filings by the three (3) non-
26 Drexler defendants), and also by other declarations in this case. Third, the Court's rulings in this
27 case related to the Trustee Motion and associated delays of reorganization related filings (including
28 the sale-related filings), despite a lack of evidence presented by Drexler, has materially increased

1 the economic risk of the case for Empery, vendors, and others. Administrative expenses will pile
2 on the case at such a substantial rate that the Debtor will not be able to reorganize due to lack of
3 cash anticipated to be available on the effective date. The incremental administrative costs to
4 support the Debtor and the Committee professionals through a protracted Trustee Motion were not
5 contemplated and cannot be supported by the DIP budget. While Empery as DIP lender agreed to
6 finance the DIP budget, it did not agree to finance an unlimited amount through confirmation.

7 For the reasons stated above, Empery requests the Court enter an order approving
8 Debtor/Empery/Committee's Proposed Discovery and Hearing Plan.

9 DATED this 5th day of July, 2023.

10 GARMAN TURNER GORDON LLP

11 /s/ William M. Noall

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